1996

State of Utah v. Joseph P. Powasnik : Brief of Appellant

Utah Court of Appeals

Jan Graham; Utah Attorney General; Attorney for Appellee.
Blain Perry McBride; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Appellee, v. JOSEPH P. POWASNIK, Defendant and Appellant.	)	Trial Court No. 931000142 Appellate Court No. ~~940204-CA~~ 960116-CA

BRIEF OF DEFENDANT-APPELLANT

On **Appeal from the First Judicial District Court** in and for **Cache County, State of Utah, Honorable Gordon** J. Low

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	Trial Court
Plaintiff and Appellee,	)	No. 931000142
	)	
v.	)	Appellate Court
	)	No. 940204-CA
JOSEPH P. POWASNIK,	)	
	)	
Defendant and Appellant.	)	

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IN THE UTAH COURT OF

APPEALS

STATE OF UTAH	)	
	)	
Plaintiff and Appellee,	)	
	)	Appellate Court No. 94024-CA
v.	)	
	)	Priority #2
JOSEPH P. POWANSNIK	)	
	)	
Defendant and Appellant.	)	
	)	

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over final orders entered by the District Court pursuant Utah code Annotated (1953 as amended), § 78-2a-3

STATEMENT OF THE ISSUES

AND STANDARD OF REVIEW

I. WHETHER A PROVISION UNDER UTAH CODE § 58-37-8(5)(b) WHICH PROVIDES FOR A GREATER PENALTY FOR CONVICTION OF A CRIME AS IDENTIFIED UNDER UTAH LEGISLATION, IF THE ACT IS COMMITTED WITHIN 1000 FEET OF A PUBLIC PARK IS A SEPARATE OFFENSE, THUS REQUIRING PROOF DURING TRIAL, OR IS A SENTENCE ENHANCEMENT?

II. WHETHER THE JUDGE EXCEEDED HIS SCOPE WHEN ADMITTING INTO EVIDENCE BY JUDICIAL NOTICE THE POLICE MEASUREMENT OF THE RESIDENCE BEING WITHIN 1000 FEET OF A PUBLIC PARK?

III. ASSUMING JUDICIAL NOTICE OF THE POLICE MEASUREMENT IS IMPERMISSIBLE, WHETHER THE PROSECUTION ESTABLISHED THE PROPER FOUNDATION FOR ADMISSION OF THE FINDING THAT THE RESIDENCE WAS WITHIN 1000 FEET OF A PARK?

STANDARD OF REVIEW

ISSUES I, II, & III

The Utah Court of Appeals should treat the trial court's conclusion and the admissibility of evidence as a question of law. State v. Mickelson, 848 P.2d 677 (Ut. Ct. App. 1992); State v. Ramirez, 817 P.2d 774, 781 (Utah 1991). The court shall "review such questions for correctness, according no particular deference to the trial court. State v. V.G.P., 845 P.2d 944 (Ut. Ct. App. 1992); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988). In addition, the Court, in reviewing the trial court's conclusions of law, shall apply "a correction of error standard with no deference to the trial court." Hansen v. Dept. Of Fin. Insts., 858 P.2d 184, 185-86 (Ut. Ct. App. 1993); Marchant v. Park City, 771 P.2d 677, 680 (Ut. Ct. App. 1989). Also, statutory construction presents a question of law, which the court reviews for correctness. Scudder v. Kennecott, Inc. 858 P.2d 1005, 1009 (Ut. Ct. App. 1993); Berube v. Fashion Centre Ltd., 771 P.2d 1033, 1038 (Utah 1989).

STATEMENT OF THE CASE

The Defendant, Joseph P. Powasnik, at the residence of one, DeAnne Cain, a girlfriend, was alleged to have been, in conjunction with DeAnne Cain, using the location at 207 South 200 East, Logan, Utah, for the distribution of methamphetamine. Using police a UHF Frequency Scanner law enforcement officers monitored telephone conversations from Third party(s) to DeAnne Cain's residence. Based on the information received therein, search warrants and warrants for arrest were issued and various individuals were arrested including DeAnne Cain and Joseph P. Powasnik. DeAnne Cain and at least one other Defendant entered a guilty pleas to reduced charges, pursuant to plea negotiations which included in part, the promise to give testimony against the Defendant herein, Joseph P. Powasnik. The search warrant revealed the evidence of materials that was alleged to be drug paraphanalia as well as substance that was, according to testimony, a lab at Weber State College to be the controlled substance of methamphetamine. Subsequent to the arrest the Defendant was incarcerated and based on alleged probation violation remained incarcerated until the time of the trial and final sentencing.

a. NATURE OF THE CASE

The alleged distribution of a controlled substance to wit: methamphetamine was charged as a second degree felony and enhanced to a first degree felony as a result of the allegations that the

alleged sale or distribution took place within a thousand feet of a park. It is the enhancement of the charge which is the subject of this appeal.

b. COURSE OF PROCEEDINGS

Defendant, after multiple arraignments and scheduling of preliminary hearing was granted a conflict of interest public defender to represent him in preliminary hearing and subsequently bound over to the First District Court for proceedings before the Honorable Judge Gordon Low.

c. DISPOSITION OF TRIAL COURT

1. Trial Court through Judge Gordon Low advised the respective attorneys for Plaintiff and Defendant that he was treating the enhancement to be a sentencing matter and that evidence regarding enhancement would be heard after the trial and out of the hearing of the Jury. Thereafter, pursuant to a Jury trial, the matter was heard on the 20th day of December, 1994, at which time, despite disputes in testimony, the Jury verdict of guilty was entered to a second degree felony of drug distribution (methamphetamine).

The enhancement hearing was conducted on the 3rd day of January, 1995, at which time the judge made a finding that there was sufficient evidence, that the distribution of methamphetamine, which was the verdict from the prior Jury trial, occurred with in

a thousand feet of a park and was therefore to be enhanced under Utah Code. Having thus made the finding the matter was scheduled for sentencing and Defendant was, thereafter, sentenced to a term of not less than five years to life with a probation violation being established and the original sentence that the state entered and advised for the recommendation to the Board of Pardons that the sentences run concurrently. Subsequently, the matter was appealed by the Defendant.

STATEMENT OF FACTS

Despite the disputed testimony regarding the ownership of the drugs and drug **paraphernalia** located at the residence of DeAnne Cain and the party or parties to whom any drug transactions may have taken place the Jury did, in fact, find the Defendant guilty of the second degree crime of distribution of a control substance to wit methamphetamine.

At the time of the enhancement hearing the state called its witnesses, officer Tim Scott, who's testified that he had been present at the time of the measurement of the distance of the residence of DeAnne Cain to the park in question and the officer conducting the measurement used a pedometer. Testimony is disclosed by the transcript disclosed that while he was present he did not do the actual measurement, did not select the instrumentality to be used for measurements and only had his attention drawn to the reading on the pedometer. Counsel for the Defendant objected to the in conclusion of this testimony on the basis that it lacked foundation both as to the inclusion of the reading by virtue of having not been a party to which had actually conducted the measuring, and in addition, on the basis that he could not testify that the instrumentality used for the measurement have been calibrated, was in working order or to how it was selected for use or any of its history.

Notwithstanding the objection, the Judge hearing the matter accepted the evidence and as an additional factor found that,

because of his own personal knowledge of that locality (having passed papers as a young boy), took judicial notice that the blocks in that area were approximately 800 feet and that therefore the Cain residence was in fact within a 1,000 feet of the park.

The court erred in treating the enhancement as a mere sentencing enhancement and not an element of the crime, and in allowing the inclusion of the evidence from the pedometer for the measurement of the 1,000 feet for the enhancement, and for taking judicial notice of facts that were his own personal knowledge but not within the general knowledge of an ordinary reasonable member of society.

SUMMARY OF THE ARGUMENT

Defendant-Appellant alleges that the following is a summary of the arguments which show that the courts order of enhancement, should be set aside, and the case be remanded for sentencing in accordance with a conviction for a second degree felony.

The law does not support the trial courts holding in the above-entitled action to allow for the conviction of nor enhancement to a First Degree Felony.

The 1000 feet within a park is or should be a separately proven element of the crime charged as a First Degree Felony. This means the measurement of the 1000 feet should be subject to appropriate and discernable safeguard as to its use, which would be

the basis for the foundation necessary for its proper inclusion as credible evidence. Further, the judge should not include those items within his own personal knowledge as an evidentiary basis for a decision unless it is clearly within the common knowledge of the ordinary and reasonable member of society.

POINTS, AUTHORITIES, AND ARGUMENT

I.

UTAH CODE SECTION 58-37-8(5)(b) WHICH PROVIDES FOR A GREATER PENALTY FOR CONVICTION OF A CRIME INVOLVING POSSESSION AND/OR DISTRIBUTION OF A CONTROLLED SUBSTANCE CONSTITUTES AN "OFFENSE" WHICH HAS AN ELEMENT OF PROOF THAT THE ACT COMMITTED TOOK PLACE WITHIN 1000 FEET OF A PUBLIC PARK.

A person who is convicted under subsection 5(a) of Utah Code Ann. § 58-37-8 is subject to a greater penalty for the commission of any unlawful act involving controlled substances or drug paraphernalia if the act is committed within 1,000 feet of any schools and other specified structures, facilities, or grounds, including public parks.[1] The state legislature enacted this

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[1] Utah Code Ann. §§ 58-37-8(5)(a) - © provides:
"(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (5)(b) if the act is committed:
(I) in a public or private elementary or secondary school or on the grounds of any of those schools;

statute to enhance criminal penalties for specific conduct. The statute was enacted "to protect the public health, safety, and welfare of children of Utah from the presumed extreme potential danger created when drug transactions occur on or near a school ground." State v. Moore, 782 P.2d 497, 503 (Utah 1989). See also United States v. Holland, 810 F.2d 1215, 1222 (D.C. Cir.), cert. denied, 481 U.S. 1057, 107 S.Ct. 2199, 95 L.Ed.2d 854 (1987) (The Utah Supreme Court supports its conclusion of the legislature's intent by use of this case.)

(ii) in a public or private vocational school or post-secondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (5)(a)(I) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in a church or synagogue;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (5)(a)(I) through (viii); or

(x) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for parole until the minimum term of imprisonment under this subsection has been served.

© If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

Utah patterned its sentence enhancement provision after the federal Controlled Substances Penalties Amendments Act of 1984. State v. Stromberg, 783 P.2d 54, 59 (Ut. Ct. App. 1989); see 21 U.S.C.A. § 860(a) (Supp. 1993); see also State v. Vigh, 871 P.2d 1030, 1035 (Ut. Ct. App. 1994).[2] Thus, federal case law offers direction in answering the question as to whether or not Utah Code section 58-37-8 (5) constitutes an "offense" which has an element of proof that the act committed took place within a 1,000 feet of a public park. In the Tenth Circuit of the United States Court of Appeals, the Court recently found that the district court "erroneously withdrew any charge based on that statute from the jury's consideration in the mistaken belief that section 860 (a) did not create a substantive offense and was only a sentencing enhancement." United States v. Ashley, 26 F.3d 1008, 1011 (10th

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[2] 21 U.S.C. § 860 (a) (Supp. IV 1992) reads as follows:
"(a) Penalty
Any person who violates section 841(a)(1) or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school of a public or private college, junior college, or university, or a playground, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b) of this section subject to (1) twice the maximum punishment authorized by section 841(b) of this title; and (2) at least twice any term of supervised release authorized by section 841(b) of this title for a first offense. A fine up to twice that authorized by section 841(b) of this title may be imposed in addition to any term of imprisonment authorized by this subsection. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a person shall be sentenced under this subsection to a term of imprisonment of not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marijuana."

Cir. 1994). The Court in supporting its decision agreed with an earlier Tenth Circuit which stated:

> "We agree with those circuits that have concluded that § 860 constitutes an "offense" which has as an element of proof that the distribution occurred within 1,000 feet of a protected place. While some circuits construed § 860 before it was renumbered and amended, these differences do not affect our inquiry. Similarly, § 860(a) includes as protected places playgrounds and various types of schools. Some circuits construed the statute in the school context, yet the analysis of § 860(a) as an offense would also apply to a playground. See United States v. Freyre-Lazaro, 3 F.3d 1496, 1507 (11th Cir. 1993)(holding that § 841(a) is a lesser included offense of § 860); United States v. Scott, 987 F.2d 261, 266 (5th Cir. 1993) (same); United States v. Thornton, 901 F.2d 738, 741 (9th Cir. 1990) (statute "incorporates the sentencing enhancement element into the underlying offense"); United States v. Holland, 810 F.2d 1215, 1218 (D.C. Cir.)(statute "adds an element to the offense of section 841(a)" which must be "proved"), cert denied, 481 U.S. 1057, 107 S.Ct. 2199, 95 L.Ed.2d 854 (1987).

United States v. Smith, 13 F.3d 380, 382 (10th Cir. 1993).

The courts within the State of Utah have supported this notion of an "offense", even though they have not addressed this issue directly. In a 1989 case, the Utah Supreme Court stated that "Section 58-37-8(5) merely enhances the penalty when an aggravating factor is present." State v. Moore, 782 P.2d 497, 505 (Utah 1989). In discussing the legitimacy that a legislature may enhance criminal penalties for specific conduct in its discretion, the Utah Court of Appeals concluded that "In this case, the crime for which defendant stands convicted is identical to the offense of possessing controlled substances, except for the additional element that the offense must occur within 1,000 feet of a school." State v. Stromberg, 783 P.2d 54, 60 (Ut. Ct. App. 1989), cert. denied,

795 P.2d 1138 (Utah 1990).

Thus, Section 58-37-8(5) constitutes an "offense" which has an element of proof that the act committed took place within a 1,000 feet of a public park and should be proven by the prosecution during the course of a jury trial.

II.

THE JUDGE EXCEEDED HIS SCOPE WHEN ADMITTING INTO EVIDENCE BY JUDICIAL NOTICE THE POLICE MEASUREMENT OF DEFENDANT'S RESIDENCE BEING WITHIN 1000 FEET OF A PUBLIC PARK.

Rule 201(b) of the Utah Rules of Evidence states that "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In determining the meaning of this rule, The Utah Supreme Court has stated: " In short, a court is presumed to know what every man of ordinary intelligence must know about such things." Little Cottonwood Water Co. V. Kimball, 289 P. 116 (Utah 1930); see also Defusion Co. V. Utah Liquor Control Comm'n, 613 P.2d 1120 (Utah 1980). Thus, a court can take judicial notice of things which are commonly known. This should be distinguished from judicial knowledge of public records, laws, etc which the court is deemed to know by virtue of its office.

In the present case before this court, the trial court judge took judicial notice of the police measurement of defendant's residence being within 1,000 feet of a public park. This

determination is based on the judge's presumed knowledge that a standard block in the county is 800 feet; the park is 1 block from the defendant's residence; the judge's personal familiarity with the area; and an officer's determination that the defendant's residence is located 20 feet from the corner of the block. This determination to admit into evidence the police measurement that the defendant's residence was within 1,000 feet of a public park without the proper offering of proof by the prosecution was beyond the judge's authoritative scope. The measurement is not an item which "every man or ordinary intelligence must know about such things" nor is it judicial knowledge which the court is deemed to know by virtue of its office.

Whether or not a judicially noticed fact of the location of streets and distances between them can be taken by a court has been determined by the Utah Supreme Court. In an appeal from the order dismissing a petition to set aside probate proceedings, the Utah Supreme Court declared: "We cannot take judicial notice that these street [University Avenue and Center Street] are in Provo or that they are actually within 80 yards of each other." In re Phillips' Estate, 44 P.2d 699, 705 (Utah 1935). Subsequent to In re Phillips' Estate, the Court affirmed its earlier position by stating: "we cannot take judicial notice of the location of places recited in the affidavit and without so doing we cannot find improper posting." Jenkins v. Morgan, 196 P.2d 871, 873 (Utah 1948).

Thus, for the reasons mentioned above, the court exceeded its scope when admitting into evidence by judicial notice the police

measurement of defendant's residence being within 1,000 feet of a public park.

III.

ASSUMING JUDICIAL NOTICE OF THE POLICE MEASUREMENT IS IMPERMISSIBLE, THE PROSECUTION DID NOT ESTABLISH THE PROPER FOUNDATION FOR ADMISSION OF THE FINDING INTO EVIDENCE THAT THE DEFENDANT'S RESIDENCE WAS WITHIN 1,000 FEET OF A PUBLIC PARK.

During the trial, no testimony or evidence was ever established by the prosecution in its offer of proof in determining that defendant's residence was within 1,000 feet of a public park. In the subsequent enhancement hearing, an officer gave testimony that the distance between the park and the residence was measured by a pedometer, but the officer was not the one who made the measurement nor could he testify to any questions pertaining to the accuracy of the pedometer or its calibration. Thus, the prosecution needs to establish by direct evidence, hearsay exception, or by statutory authority that the measurement was taken, results were obtained, the measurement was accurate, the device which was used to take the measurement is operable and its reading is reliable. From the record of the trial and the sentence enhancement hearing, the prosecution failed to establish this important element in its case.

Other instruments used by police officers in the field, such as a breathalyzer, must be supported by the proper foundation in order to be introduced into evidence in a court of law. For example, in the case of a breathalyzer, in order to overcome any direct proof or hearsay exceptions, the Utah legislature enacted a

statute which relieves "the State of Utah and other governmental entities of the financial burden of calling as a witness in every DUI case the public officer responsible for testing the accuracy of the breathalyzer equipment"Murray City v. Hall, 663 P.2d 1314, 1320 (Utah 1983). The Utah Supreme Court went on to conclude:

> "Thus, in place of the officer's testimony, § 41-6-44.3 permits the admission of affidavits regarding the maintenance of a specific breathalyzer as evidence of the proper functioning of that breathalyzer machine and the accuracy of the ampoules. However, prior to the acceptance of those affidavits to establish a presumption of the validity of the test results, § 41-6-44.3 requires an affirmative finding by the trial court that (1) the calibration and testing for accuracy of the breathalyzer and the ampoules were performed in accordance with the standards established by the Commissioner of Public Safety, (2) the affidavits were prepared in the regular course of the public officer's duties, (3) that they were prepared contemporaneously with the act, condition, or event, and (4) the "source of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness."

Id., at 1320. In this case, the Utah Supreme Court recognized this statute as a valid exception to the hearsay rule, but required a proper foundation for the breathalyzer evidence. In addition, Utah Admin.R. 735-500-3 (1987) states that a breath testing instrument must be checked for proper calibration on "a routine basis, not to exceed forty (40) days."

Thus, the prosecution never attempted to establish any direct evidence, hearsay exception, or statutory authority to show that defendant's residence is within 1,000 feet of a public park. The prosecution never established proof of the proper maintenance and use of the pedometer or provide testimony of the person taking the measurements of its reading or accuracy. The prosecution failed to

show that the pedometer is governed by any statutory exception similar to the breathalyzer or that it is regulated by an administrative rule as to its calibration. Therefore, the prosecution did not establish the proper foundation for admission into evidence of the finding that the defendant's residence was within 1,000 feet of a public park.

CONCLUSION

Based upon the preceding arguments, the lower court's judgment should be reversed to the extent that it convicted and sentence the Defendant.

To a First Degree Felony with its minimum mandatory 5 year provisions and the matter should be remanded to the District Court with instruction to enter a conviction to the Second Degree Felony conviction of the jury and a sentence should be entered on the Second Degree Felony with credit for time served.

DATED this 29th day of September, 1995.

BLAINE PERRY MCBRIDE
Attorney for Defendant-Appellant

By _____
BLAINE PERRY MCBRIDE

CERTIFICATE OF SERVICE

I hereby certify that 4 true and correct copies of the foregoing DEFENDANT-APPELLANT'S BRIEF were mailed to:

Jan Graham
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on the 29th day of September, 1995, postage pre-paid.

By _____
Blaine Perry McBride